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IN THE

Supreme Court of the United States

October Term, 1964

No. 796

AWARE, INC., a corporation, and
VINCENT W. HARTNETT,

Petitioners,

against

JOHN HENRY FAULK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

LOUIS NIZER,
Counsel for Respondent.

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The "Questions Presented" by Petitioners Are Spurious

Petitioners' invocation (p. 2 *et seq.*) of *New York Times Co.* v. *Sullivan*, 376 U. S. 254, utterly ignores all of the pertinent facts, as found by the New York courts and, for the most part, admitted on the trial. None of the requisites enunciated in that decision is present here:

(1) The respondent, as second vice-president of the New York Local Board of Directors of the American Federation of Television and Radio Artists (hereinafter simply termed "AFTRA"), was certainly not a "public official" — any more than an officer of a private corporation is.

(2) The petitioners herein were not engaged in criticism of respondent's "official conduct," under any stretch of

that concept, or, indeed, in any discussion of matters of public interest. They deliberately engaged in the most vicious form of private character assassination conceivable, for the sole, admitted purpose of destroying the respondent's livelihood, and thereby furthering their own corrupt interests (*vide infra*). For these two reasons, the New York Court of Appeals' decision that petitioners "enjoyed no such privilege under the Constitution of the United States" (14 N. Y. 2d 899; pet., p. 17) was clearly correct.

(3) Even if there had been such a privilege — "qualified" and, therefore, destructible by proof of "malice" (*New York Times Co.* v. *Sullivan, supra,* at 279-80) — the adjudicated and uncontradicted evidence of malice here was overwhelming, and far exceeded the "knowledge of falsity or reckless disregard" which the petition (pp. 34-37) asserts is required — and concedes is sufficient — to vitiate the privilege. Thus, in contradiction of petitioners' statement (p. 16) that "[t]he Appellate Division had only this to say on malice" — followed by a quotation from its opinion, which is alone sufficient to distinguish the *Sullivan* case — the language quoted is immediately preceded by the following:

> "He [plaintiff] conclusively established that the defendants planned to destroy his professional career through the use of the libelous publications directed to the places where they would do him the most harm. He proved that they succeeded in doing so."

Petitioners have also omitted the subsequent language of the opinion, which renders their entire petition a travesty:

> "He was professionally destroyed, his engagements were cancelled and he could not gain employment in his field despite every effort on his part.
>
> * * * So we have, as found by the jury and amply supported by the evidence a vicious libel, deliberately and maliciously planned and executed with devastating effect upon the plaintiff, all without a semblance

of justification." (19 App. Div. 2d 464, 476-68, pet., pp. 85-86)

The evidence and admissions of petitioners' viciousness, as well as their actual knowledge of falsity, will be briefly reviewed hereinbelow.

The only real "question presented" by this petition is whether the entire common law right of action for libel should be abolished—even in behalf of a private individual who is the victim of the most malicious and unjustified attack heretofore reported. The only freedom of expression involved was that of the respondent. The petition is, in reality, an attempt to subvert the very constitutional guarantees which it hypocritically invokes.

Statement of the Case

The "facts" selected by the petitioners are so inadequate and distorted as to render the case unrecognizable. Many of the salient facts are completely omitted, the others are misstated, and most of petitioners' assertions are utterly devoid of support in the record. In order, however, to spare the Court a detailed refutation, this brief will be confined to a concise summary of the pertinent facts, based almost entirely upon documents and admissions during the trial.

The "background" (pet., p. 6 *et seq.*) and the publication of Aware Publication 16.

During the period between 1953 and 1956, the New York local of AFTRA had fallen under the control of the two petitioners, Aware, Inc., and its researcher-writer and director Hartnett. They, were not members of the union at all (325-26; 5588)*. Nevertheless, they controlled its policies and intimidated its membership (543 *et seq.*, 2116 *et seq.*, 2298-301; Exs. BB. EE). Aware was a "self-

* Numbers and letters in parentheses refer to pages or exhibits in the Appellate Division record.

perpetuating group'' of vigilantes who engaged in the ''blacklisting'' of union members, and Hartnett earned a large income by reporting to networks, agencies and sponsors the alleged ''pro-Communist affiliations'' of entertainers and others employed on television and radio programs (pet., pp. 44-45).

In March 1955, the members of AFTRA, at a general membership meeting, girded up enough courage to oppose petitioners' tyranny and adopted, by a large majority, a resolution vigorously condemning the blacklisting activities of Aware and its ''interfering in the internal affairs of our union'' (Exs. 38, 39). On the insistence of the Aware-dominated board of directors, this resolution was submitted by referendum to the entire membership, with Aware-inspired propaganda urging its defeat, but the resolution was carried by an almost two-to-one vote (580, 585-86, 592).

This membership resolution was a clear mandate to designate a new slate of directors opposed to petitioners' practices (592-93, 2117-20, 2301). It led, inevitably, to the formation of the ''middle-of-the-road'' slate, which is the subject of the ''News Supplement to Membership Bulletin, Aware Publication 16'' (Ex. 41, pet., pp. 61-64, hereinafter termed the ''Aware Bulletin''), the principal libel in suit. The term ''middle-of-the-road'' clearly and accurately signified that this slate, headed by the prominent CBS commentator, Charles Collingwood, and including Garry Moore, Orson Bean and the respondent, was as strongly anti-Communist as it was anti-blacklisting (2158, 5473). It was elected by an overwhelming majority, in ''the largest vote which was ever recorded in AFTRA history'', and respondent was elected to a lower office, that of ''second vice-president'' (600-01).

The middle-of-the-road slate represented an obstacle to the tyrannical domination of the union by Aware and to the racketeering practices of Aware's ally and director,

Hartnett. Hartnett, who every day cleared or condemned the loyalty of television and radio personnel (without notice to them), received fees of from $5 per name for a nominal check to from $20 to $300 for a more detailed report, and $2 for a simple recheck (*e.g.*, 366 *et seq.*, 377, 380-82, 391, 404, 410, 894-95, 2939, 4899, 6496; Exs. 33, 58A, 58B, 58C). Although his prior earnings had been most meagre, Hartnett amassed during the several years of this employment, nearly $100,000 (Ex. 33). It was this "blood money" which Hartnett feared was jeopardized by the election of the middle-of-the-road slate.

Until respondent joined this slate, petitioners had never in any way even mentioned him. Thus, although Hartnett had written several of the "most comprehensive" listings of "persons with alleged Communist front participation", he had never referred to any of the activities falsely alleged in the libels in suit (*infra*) because he, admittedly, did not consider them "important" enough (835-38, 4671, 5540-48, 5550, 5543).

Directly after respondent's election on December 15, 1955, Aware's board of directors, including Hartnett, met and planned specific measures to terminate his career (Ex. 119; 4740 *et seq.*). Hartnett urged Aware to "reprint" certain references to respondent in the Daily Worker, adding "a few comments by Aware, and then send the copies to the [advertising] agencies" (Ex. 119; 4747)—upon which respondent's career and livelihood were dependent. The board of directors specifically instructed Hartnett "to investigate respondent's record" and "to set forth as much of Mr. Faulk's alleged pro-communist front record as [he] could" (4237-39).

In addition (and in refutation of petitioners' bland dismissal of "a conspiracy theory"—p. 13), co-defendant Johnson and his cohorts in Syracuse were specially invited to attend the next Aware membership meeting (*ibid.*;

Ex. 119). That meeting was held in January 1956, and the Aware Bulletin attacking respondent (Ex. 41) was announced and described (5863). Johnson's associate then and there stated that they would make use of the Bulletin (5864-65)—as indeed they did (see, *e.g.*, Exs. 35, 46B, 47).

It was decided to publish the article, not as an ordinary "membership bulletin" but as a "news supplement", so that it could be distributed not only to Aware's members, but also to its mailing list of about 2,000 names (pet., p. 9; Ex. 42; 4180-81). That mailing list, which was designed to reach every possible source of employment which respondent could hope for, included, *inter alia*, (1) every newspaper in New York, (2) every radio and television station, (3) a special copy to Dr. Frank Stanton, the President of the Columbia Broadcasting System, respondent's employer, (4) national advertising associations, (5) the leading advertising agencies, (6) the National Association of Retail Grocers (one of respondent's chief assets was his ability to sell supermarket items), (7) every major motion picture studio, (8) large commercial corporations engaged in extensive advertising, (9) all four actors' unions, (10) law enforcement agencies, including the F.B.I. and the New York City Police Department, (11) Congressmen and Senators, including the House Un-American Activities Committee and the Chairman of the Senate Internal Securities Committee, (12) leading patriotic and civic organizations, (13) various chambers of commerce, and (14) the leading magazines and columnists (Ex. 42; 19 App. Div. 2d 464, at 466, pet., pp. 82-91, at 84). At the trial petitioners admitted, euphemistically, that they "knew * * * [that the Bulletin] might affect the employment of John Henry Faulk" (4193), and that they "intend[ed] to influence the conduct of [its readers]" (4205; pet., p. 40).

The extreme malice manifested by petitioners.

It was demonstrated that the Bulletin, which was written by petitioner Hartnett and published by co-petitioner

Aware, Inc. (Ex. 41, pet., pp. 61-64) was a succession of lies from start to finish (5660-61).

Its charges that the middle-of-the-road slate did not openly and seriously oppose communism and that the respondent did not intend to perform his official duties in enforcing the Union's rules against communists were demonstrated to be false (Exs. 40, 68, 71, 812-13, 1785, 2043-44, 2168-70, 5472-75). Similarly, Hartnett admitted the falsity of the smear that the middle-of-the-road slate "was first reported by the Daily Worker" (pet., p. 62; 5206-10). He further admitted that he had falsely attributed to that publication a quotation commending the slate, which he had actually copied from the New York Herald Tribune (5517).

The Aware Bulletin then accuses the respondent personally of seven affiliations with Communist and Communist-front activities (924-26), the falsity of each of which was proven as a matter of law. In five of the seven instances, petitioners submitted not one iota of evidence that respondent had ever attended any activity or organization even remotely resembling the one referred to, and he had not (19 App. Div. 2d 464, at 468, pet., p. 86). In addition, in all seven instances, the petitioners egregiously distorted the nature of the function referred to, respondent's alleged connection therewith, and all the relevant surrounding circumstances, and they published their charges without any verification or honest documentation.

The instance now stressed by petitioners (pp. 15-16) is respondent's alleged appearance with an "identified Communist * * * under the auspices of the Independent Citizens Committee of the Arts, Sciences and Professions (officially designated a Communist front * * *)" (pet., p. 63). The following are the admitted facts:

Petitioners "deliberately and purposefully" omitted from their bulletin all of the material circumstances, in-

cluding that (1) the affair referred to was actually "A Salute to the United Nations on the occasion of the First Anniversary of the San Francisco Conference" (Ex. 53; 4600); (2) among the speakers were the Secretary General of the United Nations, the Secretary of State of the United States and the ministers of Great Britain, France and China; (3) the entire ceremony was broadcast over WCBS, which it, as respondent's employer, had asked him to attend, and it was co-sponsored by the American Bar Association, the YMCA and ten other, similar organizations; and (4) even the Independent Citizens Committee—the only sponsor mentioned—had never been "designated a Communist front" and was in fact, as petitioners conceded, of "miniscule" significance (Ex. 53; 4600-08, 6057).

Petitioners have the temerity to describe their report of this event as not a "falsification," but an honest selection of facts, in which:

> "The thrust of the item is still in no way different. One man's relevance is evidently another man's poison." (pet., p. 50)

To insist, as this petition does, that respondent's participation in so patriotic an activity justified petitioners' charge that he would betray his duties as an officer of AFTRA and, as the jury found, that he was pro-Communist or sympathetic with Communism (8027), is an effrontery. To urge that petitioners' admitted knowledge of these facts did not constitute "knowledge of the falsity" of their charge (pet., pp. 49-50) is an absurdity.

The extreme malice of all seven charges against respondent was aggravated even further by petitioners' admissions that they had no information whatsoever, even trivial or specious, against the plaintiff at any time subsequent to 1949 (5543-45)—seven years prior to their libelous Bulletin, and that such a lapse would, in any other case, have caused them "to forget about the whole thing" (5548); that they

had avidly checked the records of all the Congressional committees and no less than thirteen possible sources of information in the hope of unearthing any information adverse to the respondent, but found nothing against him (839, 4663, 5316, et seq., 5324, 5432-33); and that they had systematically omitted all of the many favorable and highly patriotic attributes of respondent's career, including his war-time enlistment despite his blindness in one eye (4680, 57-61), his numerous professional, patriotic and charitable activities, awards and honors (e.g., Exs. 10A, 10B, L), and the concededly "important fact that his broadcasts were solely an entertainment program without any political overtones" (4692-94).

Nor did petitioners disclose another, concededly "very important" fact: that all but one of respondent's seven alleged affiliations pre-dated the alleged "citation" of the organization involved, if any, so that respondent could not possibly have known, at the time of his alleged isolated contacts with those organizations, that they had even been commented on (4618-19, 4623, 4627-30, 4634-35, 5029, 6042, 6109, 7107; Ex AS). In short, the ancient, isolated alleged affiliations of respondent, so grossly distorted in the Bulletin, were not only false but were also, as petitioners well knew, devoid of all significance.

Even the petitioners were constrained to admit that "up to this moment * * * Mr. Faulk [has continued to be] a loyal and patriotic American" (4236). Nevertheless, Aware conceded that the whole purpose of its Bulletin "so far as Mr. Faulk was concerned was to have people who read Exhibit 41 [the Aware Bulletin] believe that he had pro-Communist affiliations" (4690). Could "actual malice" (pet., p. 33) be more clearly demonstrated than by these admissions, and by Aware's blunt acknowledgement that respondent's alleged affiliations "acquired significance [merely] because he was a candidate, a successful candidate for office," and that they refrained from making any charges against

"other people in AFTRA with much more substantial records" (4721)?

Even this petition concedes (p. 40):

> "Petitioners grant that there was no love lost between Faulk and them. They admit undertaking research to find out what would be damaging to Faulk, whose political views on control of AFTRA were so opposed to theirs. They wanted to see him out of AFTRA office. If what they uncovered in their research would also be unfavorable to Faulk in his job of making public broadcasts, that would not bother them."

Nor do even the foregoing admissions fully summarize the petitioners' deliberate and malicious campaign against respondent personally (19 App. Div. 2d at 467, pet., p. 85). On November 19, 1955, at the very height of the middle-of-the-road slate's campaign (847), petitioner Hartnett wrote the Chief Clerk of the House Committee on Un-American Activities, asserting and supplementing many of the scurrilous charges soon to be included in the Bulletin (Ex. 54)—for the evident purpose of soliciting the aid of that Committee in defeating what he described as the "Daily Worker"—supported union slate.

Eight days later, and still in the midst of the election campaign, Hartnett wrote to Young & Rubicam (Ex. 58A), which he knew was one of the largest advertising agencies in the country (5605) and placed the advertising for a number of sponsors on respondent's radio program (see Ex. 47). The only report in this eight page letter which Hartnett gave unsolicited and without charge (5211-12) was on "the co-leader of this ticket John Henry Faulk [who] has a significant Communist front record." He added, "I am afraid he [Faulk] is 'using' the liberals" (Ex. 58A, p. 2; 5603).

At the trial Hartnett admitted that such a letter would cause Young & Rubicam to "think twice in connection with

employing such a man'' (5606). He also admitted that he "had no evidence to back up a charge that he [respondent] was pro-Communist,'' and had "no knowledge of [respondent's] motivation'' (5459, 5672). He thus, admittedly, had full "knowledge of falsity'' (pet., p. 3) of his report and, moreover, he sent it for the acknowledged purpose of destroying respondent's career.

Hartnett carried his malice to the extent of informing a lieutenant in the New York City Police Department that respondent had "Communist front affiliations,'' and asked him for additional information, on his representation which he again admitted to be untrue—that the "middle-of-the-road slate was helping Communism'' (5769-78, 5472-75).

Thereafter, Hartnett wrote other letters regarding respondent to the Kudner Agency, "a leading advertising agency that employed [professional] artists'' (5616), and to the Borden Company (Exs. 58B, 58C)—both of whom, as well as Young & Rubicam, the recipient of the first letter, he admitted, "certainly placed great reliance on'' his personal reports (5611-12).

Furthermore, on May 7, 1956, the President of Grand Union Supermarkets wrote to petitioner's co-defendant putting him on notice of the false charges being circulated about the respondent (Ex. 99). That letter was immediately called to the attention of the petitioners (3349-51), and they assured their co-defendant that there was documentary support for all "the citations, at least as such'' (3354). Thereafter, on June 15, 1956, the petitioners were served with the summons and verified complaint in this action, formally notifying them that the allegations contained in their Bulletin were false.

Thereupon, instead of retracting the publication or even checking its accuracy, Aware, through its President, falsely asserted on a television program that everything in its Bulletin "was the truth and nothing but the truth''

and, indeed, that respondent had "admitted" its truth and had perjured himself in his verified complaint (Ex. 98). Petitioners also alleged the truth of the Bulletin three separate times, in each of their successive verified answers.

Subsequently, with knowledge that someone at WOR "had proposed hiring Mr. Faulk" (5759-61), Hartnett maliciously told an official there that respondent, who was then no longer a union officer, had "a record of affiliations with pro-Communist groups" (5761).

ARGUMENT

POINT I

Respondent was clearly not a "public official", under even the broadest definition of that term.

The respondent was not a public or government official in any sense. He was merely the second vice-president of the New York local of AFTRA. He served without compensation, while pursuing his full-time career as an entertainer.

Petitioners' ludicrous analogy is based upon generalizations which are not only *dehors* the record, but are factually untrue and legally irrelevant. AFTRA's New York local did not "in fact exercise economic control over the careers and livelihood" of its members, nor did it "influence * * * the content of television and radio * * * programs" or control any "vast reservoir of well-paying patronage" (pet., pp. 6, 7). Its economic control and public impact were less both in scope and significance, than those of most union locals, and far less than those of the private corporations which employed its members.

Respondent individually had very little power. He was the lowest ranking of the union officers mentioned in the Aware bulletin. Contrary to the petition, he had no voice whatsoever in matters of "collective bargaining" or "the

content of television or radio programs," and no "control over the careers of his fellow artists" (let alone his own career).

The administrative and executive functions of the union were performed not by actors like respondent, but by salaried, full-time employees, such as Kenneth Groot (cf. Ex. 70).

In the *New York Times* case, this Court equated "public official" with "government employee" (376 U. S. at 283, n. 23), and declared, as a reason for recognizing a privilege, that it "would give public servants an unjustified preference over the public they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves" (at 282-83). Concededly, respondent had no such immunity for any statements he might make in the course of his duties as second vice-president of an AFTRA local. He enjoyed no privilege with respect to any attacks which he might make upon petioners, and to afford them a privilege would, in effect, grant them "an injustified preference over" him. It would also discriminate unfairly—and in respondent's case, absurdly—against labor unions.

None of the authorities cited by petitioners has the slightest resemblance hereto. No public official was even indirectly involved in either side of the AFTRA election controversy which gave rise to the libelous bulletin. Furthermore, petitioners were not members of the union at all (*supra*, p. 3), and therefore were not, so to speak, respondent's constituents.

The intra-local election had no more public significance than any contested election of directors or officers of a private corporation. Such corporation might, in fact, bargain collectively with the AFTRA local; yet who would claim that its officers—and particularly a second vice-president, who was not a participant in the bargaining—were "public officials," within the *New York Times* doctrine?

In point of fact, respondent was no more a public figure than most other private citizens. The only "public interest" which the election controversy engendered was caused by the excesses, tyranny and racketeering practices of these petitioners. They seek a privilege because of the notoriety which resulted from their own evil.*

As Mr. Justice Goldberg stated in his concurring opinion in the *New York Times* case:

> "Purely private defamation has little to do with the political ends of a self-governing society. The imposition of liability for private defamation does not abridge the freedom of public speech or any other freedom protected by the First Amendment" (376 U. S. at 301-02).

Similarly, in this Court's other decision relied upon by petitioners, *Garrison* v. *Louisiana*, 85 S. Ct. 209, 215, n. 8, it was observed:

> "We recognize that different interests may be involved where purely private libels, totally unrelated to public affairs, are concerned; therefore, nothing we say today is to be taken as intimating any views as to the impact of the constitutional guarantees in the discreet area of purely private libels."

Since the *Garrison* decision, this Court declined, on two occasions, to consider whether it would extend the concept of "public officials" to persons having more public prominence or responsibility than respondent. In both *Cepeda* v. *Cowles Magazines & Broadcasting, Inc.*, 328 F.2d 869 (9th Cir.), *cert. denied*, 85 S. Ct. 51 (1964), where the successful plaintiff was a nationally prominent professional baseball player, and *Reiling* v. *Loftsgaarden*, 126 N. W. 2d 154, *cert. denied*, 85 S. Ct. 33 (1964), where plaintiff was the village attorney, this Court refused to grant certiorari.

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* The report, mentioned by petitioners (pp. 57-58), that the late President Kennedy hailed, and the late Senator Kefauver "rejoiced in," the decision in favor of the respondent, certainly did not render him a "public official."

However, the New York courts, in *Dempsey* v. *Time, Inc.*, 43 Misc. 2d 754, 252 N. Y. S. 2d 186 (Sup. Ct.), *aff'd without opinion*, N. Y. L. J. Nov. 20, 1964, p. 15, col. 6 (App. Div. 1st Dep't), did pass upon a similar question. There the plaintiff was the former heavyweight boxing champion of the world, whose name and identity were household words. The court nevertheless held:

> "This Court is not prepared to hold that because of the mere fact that one is a public individual, he may be exposed to naked libel * * * ." 43 Misc. 2d at 757, 252 N. Y. S. 2d at 189.

See also, *Harper* v. *National Review*, 33 U. S. L. Week 2341 (N. Y. Sup. Ct.).

In *Pauling* v. *News Syndicate Co.*, 335 F.2d 659 (2d Cir.), *cert. denied*, 33 U. S. L. Week 3245, cited petitioners (pp. 25, 52), the Court of Appeals in what is clearly a dictum, stated that the *New York Times* rationale might be applicable to the plaintiff therein because of a peculiar circumstance, not here present. It felt that justice might afford a reciprocal privilege to the defendant newspaper, because such a privilege would apply to the printing of the plaintiff's libelous charges against "a member of the Atomic Energy Commission" and a "United States Senator" (335 F.2d at 671). Clearly, the instant respondent enjoyed no such privilege with respect to any libelous statements he might have made concerning the petitioners, and neither party in any way criticized any public or government official.

POINT II

The libelous publications did not "relate to [respondent's] official conduct," nor, indeed, were they expressions regarding matters of public interest.

As petitioners concede (p. 2), nothing in the libelous publications criticized respondent for any of his acts as a union officer. As hereinabove (p. 5) shown, the bulletin was planned immediately after respondent's election and prior to his taking office. As the jury and the Appellate Division clearly found, the entire purpose of the bulletin was not to question respondent's official performance, or even his suitability for office, but "to destroy his professional career" and to "poison * * * the well-springs of his professional and economic existence"—which they did "with deadly effect" (19 App. Div. 2d 464, at 467, pet., pp. 82-91, at 85).

Neither the Aware Bulletin nor the other publications above referred to were sent to the union membership, which alone was in a position to redress any grievance affecting respondent's conduct or suitability. Instead, they were sent only to persons who were in a position to destroy respondent's economic career and livelihood (see Ex. 42; p. 6, *supra*).

Not only were the libelous publications not discussion of matters of public interest, but they were not genuine discussion at all. They were sheer coercion. That coercion was effected by their circulation among respondent's employers and prospective employers, by the use of a blacklist, then so prevalent in radio and television, and by threats of economic boycott by petitioner's co-conspirator, Laurence A. Johnson, of Syracuse, who, in petitioners' own language (p. 4), was the owner of "a number of supermarkets in Syracuse [and who] was active in opposing the employment of entertainers he suspected of Communist sympathies" (see Exs. 35, 46A, 46B, 47; 2341-47, 2410-15,

3605-7, 6774, 6185-96). The uncontradicted evidence showed that Johnson, in pursuance of his conspiracy with the petitioners against the respondent, personally circulated the Aware Bulletin, as well as even more insidious letters, expressly alleged in the complaint (pet., pp. 108, 118-30), among all of the sponsors of respondent's radio program, and threatened them with an economic boycott if they continued to employ the respondent (see references at top of page).

Applicable hereto, therefore, is the language of Mr. Justice Douglas in *Garrison* v. *Louisiana*, 85 S. Ct. 209, 219, quoting from *Roth* v. *United States*, 354 U. S. 476, at 514:

> " 'Freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it.' "

POINT III

Even assuming that petitioners' libels were privileged, that privilege was vitiated by their extreme malice.

As clearly demonstrated in the Statement of the Case hereinabove, petitioners manifested malice in every form and in the highest degree. Quoting again from *Garrison* v. *Louisiana*, *supra* (which applies *a fortiori* since it involved criminal libel):

> "Calculated falsehood falls into that class of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. * * * ' Chaplinsky v. New Hampshire, 315 U. S. 568, 572, 86 L. ed. 1031, 1035, 62 S. Ct. 766. Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection." 85 S. Ct. at 216.

Moreover, these petitioners engaged not merely in "calculated falsehood," but also in premeditated character assassination, such as no one other than they would have the temerity to urge did not constitute "actual malice."

CONCLUSION

This petition is a perversion of the *New York Times* doctrine and a subversion of the very rights which are protected by it. It should be denied.

Respectfully submitted,

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